ATTORNEY FOR APPELLANT:

JEFFREY D. STONEBRAKER
Jeffersonville, Indiana

ATTORNEYS FOR APPELLEE:

STEPHEN R. CARTER
Attorney General of Indiana

GARY DAMON SECREST
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

DENNIS RAY STOTTS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 10A01-0512-CR-537
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE CLARK CIRCUIT COURT
The Honorable Daniel F. Donahue, Judge
Cause No. 10C01-0402-FA-11

September 25, 2006

MEMORANDUM DECISION – NOT FOR PUBLICATION

MAY, Judge

Dennis Ray Stotts challenges the trial court's imposition of a presumptive sentence following his conviction of criminal recklessness resulting in serious bodily injury, a Class C felony.[1] Because Stotts received the presumptive sentence, the trial court's determination a reduced sentence would depreciate the seriousness of the crime was proper under *Blakely v. Washington*, 542 U.S. 296 (2004), *reh'g denied* 542 U.S. 961 (2004) to offset mitigating circumstances. The trial court did not otherwise abuse its discretion in sentencing Stotts. Accordingly, we affirm.

FACTS

Stotts and his wife Lisa had an argument in February 2004. Stotts retrieved a .38-caliber handgun from the closet. The argument continued and Lisa was shot once, resulting in a collapsed lung. Stotts called 911. When officers arrived, Lisa stated Stotts had shot her. Stotts claimed the gun discharged when Lisa grabbed the gun to prevent him from committing suicide.

The State charged Stotts with attempted murder as a Class A felony[2] and criminal recklessness resulting in serious bodily injury. A jury found him guilty of criminal recklessness but not guilty of attempted murder. At sentencing, the State requested Stotts be incarcerated. Stotts sought placement in a community corrections program. The trial court stated:

> In determining what sentence to impose upon you the Court has considered the mandatory factors set forth at Indiana Code 35-38-1-7.1(a) and more particularly the statement of the victim, as well as the statement of the victim as it is in the Pre-Sentence Investigation Report which was much

[1] Ind. Code § 35-42-2-2.
[2] Ind. Code §§ 35-42-2-1 and 35-41-5-1.

> more extensive in terms of the impact of the shooting upon her personally and her life. I've considered that in addition to her oral statement today. So the Court finds that that is an aggravating circumstance, the extent to which she has been injured and she'll carry that injury. I've also considered the fact that the imposition of a reduced sentence would depreciate the seriousness of the offense. The imposition of a reduced sentence would depreciate the seriousness of an offense. And, I've also considered these mitigating factors, and there are many mitigating factors. And so in considering the fact that we have aggravating factors and that we have mitigating factors I find that they balance themselves out. And therefore in weighing the aggravating factors and the mitigating factors the Court finds that the presumptive sentence for this offense of Criminal Recklessness Resulting in Serious Bodily Injury is most applicable at this time.

(Tr. at 525-26.) The trial court then sentenced Stotts to the presumptive four-year term in the Department of Correction.

DISCUSSION AND DECISION

Stotts received the presumptive sentence but argues the two aggravators found by the trial court should be subject to *Blakely* scrutiny.

> Under *Blakely*, a trial court . . . may enhance a sentence based only on those facts that are established in one of several ways: 1) as a fact of prior conviction; 2) by a jury beyond a reasonable doubt; 3) when admitted by a defendant; and 4) in the course of a guilty plea where the defendant has waived *Apprendi* rights and stipulated to certain facts or consented to judicial factfinding.

Gutermuth v. State, 848 N.E.2d 716, 730-731 (Ind. Ct. App. 2006).

Recently, our Indiana Supreme Court addressed in *Davidson v. State*, 849 N.E.2d 591, 594-95 (Ind. 2006), the issue Stotts raises here:

> *Blakely* does not prohibit the trial court from finding aggravating circumstances. What it does prohibit is a trial court finding an aggravating circumstance *and* enhancing a sentence beyond the statutory maximum. Counsel has lifted up one of the logical conundrums created by *Blakely*: if a trial judge cannot find an aggravator to support more than a presumptive

> sentence, how can it use such a factor to offset mitigators, leading to a presumptive sentence? As far as we can tell, the *Blakely* court's answer would be: because the Sixth Amendment is not violated when, through whatever judicial action, the defendant receives the presumptive sentence.
>
> As for the legitimacy of the aggravator "[i]mposition of a reduced sentence . . . would depreciate the seriousness of the crime," it is an aggravating circumstance the trial court may consider in sentencing. This circumstance is properly considered only when the trial court is considering imposing a sentence below the presumptive term. It is apparent from the record that the trial court did in fact consider a reduced sentenc[e], by virtue of its statement, "that for the Court to consider a reduced sentence would depreciate the value or depreciate the seriousness of the crime, so I find that aggravating factor." The trial court did not err in sentencing Davidson.

(Emphasis original, citations and footnotes omitted.)

Davidson is dispositive of Stotts' *Blakely* claim because the aggravators found by the trial court were not used to enhance Stotts' sentence above the presumptive but rather were used to offset the mitigating circumstances found.

When *Blakely* is not implicated, sentencing decisions are within the trial court's discretion and will be reversed only for an abuse of discretion. *Hayden v. State*, 830 N.E.2d 923, 928 (Ind. Ct. App. 2005), *trans. denied* 841 N.E.2d 184 (Ind. 2005). Because the trial court found aggravating and mitigating circumstances, it was required to state its reasons for selecting the sentence it imposed. Ind. Code § 35-36-1-3. The trial court must include: (1) all significant aggravating and mitigating circumstances; (2) the reason why each circumstance is determined to be mitigating or aggravating; and (3) a demonstration that the mitigating and aggravating circumstances have been evaluated and balanced. *Prowell v. State*, 787 N.E.2d 997, 1001-02 (Ind. Ct. App. 2003), *trans. denied* 804 N.E.2d 745 (Ind. 2003).

The trial court found "the extent to which [Lisa] has been injured and she'll carry that injury" as an aggravating circumstance. (Tr. at 525-26.) The impact of the crime on the victim is typically not a valid aggravating factor. *Thompson v. State*, 793 N.E.2d 1046, 1053 (Ind. Ct. App. 2003). Rather, we presume the legislature considered the impact on the victim when it set the presumptive sentence for the offense. *Id.* However, the impact of the crime on the victim may be a valid aggravator if the impact, harm, or trauma is greater than that usually associated with the crime. *Id.*

Stotts was convicted of recklessly, knowingly or intentionally inflicting serious bodily injury on Lisa by means of a deadly weapon. *See* Ind. Code § 35-42-2-2(d). Serious bodily injury is defined as "bodily injury that creates a substantial risk of death or that causes: (1) serious permanent disfigurement; (2) unconsciousness; (3) extreme pain; (4) permanent or protracted loss or impairment of the function of a bodily member or organ; or (5) loss of a fetus." Ind. Code § 35-41-1-25. Lisa's victim impact statement in the pre-sentence report refers to the

> considerable physical pain of my post operative recovery processes as well as the mental anguish that Dennis Stotts imposed upon me and my entire family. . . . I remain in counseling for my nightmares about the night I was shot as I consciously and vividly recall my body beginning the dying process. . . . As the victim of his crime, I do not know when I will be able to live a normal life absent of [sic] regular treatments for emotional distress and regular physical exams to monitor the placement of bullet fragments still in my body, all at my expense, not his.

(App. at 181.) The trial court's statement Lisa will carry the injury appears to be a reference to her need to "monitor the placement of bullet fragments still in [her] body,"

(*id.*), an impact greater than that usually associated with the reckless infliction of serious bodily injury. Accordingly, this is a valid aggravator.

The trial court also determined the imposition of a reduced sentence would depreciate the seriousness of the crime. This is a valid aggravating circumstance only when the trial court is considering imposing a reduced sentence. *Gillem v. State*, 829 N.E.2d 598, 604 (Ind. Ct. App. 2005), *trans. denied* 841 N.E.2d 182 (Ind. 2005). It may also be used to support a refusal to reduce the presumptive sentence. *Id.* Stotts requested probation or placement in community corrections. Accordingly, the trial court did not err in considering whether the imposition of a reduced sentence, in the form of probation, would depreciate the seriousness of the crime.

A sentencing statement must include significant mitigating circumstances found by the court. *Prowell*, 787 N.E.2d at 1002. The trial court considered the mitigating factors presented by Stotts and found there were "many mitigating factors," without specifying what they were.[3] (Tr. at 526.) Although it would be better practice to specify each mitigator found, we conclude the trial court did not consider any of the mitigators significant. We note this comports with the trial court's determination the two aggravators and many mitigators "balance themselves out." (Tr. at 526.) Therefore, the court did not err when it imposed the presumptive sentence.

[3] Stotts offered the following mitigating circumstances at sentencing: calling 911 twice to request assistance for Lisa after she was shot, his remorse, his good standing in the community (attested to by various written statements read into the record), his work history (including a promise of continued employment), and his lack of criminal history. The State did not challenge these mitigating circumstances.

Aggravators need not be found by a jury or admitted by the defendant when the defendant receives the presumptive sentence. The trial court did not abuse its discretion in sentencing Stotts. Accordingly, we affirm.

Affirmed.

BAKER, J., and SULLIVAN, J., concur.